

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 07-0040
Sales Tax
For Tax Years 2003-05**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-8.1-5-1.

Taxpayer protests the assessment of sales tax.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a golf resort with various amenities including golf courses, a pro shop, a restaurant, banquet facilities, and lodging. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for sales and use tax for the tax years 2003, 2004, and 2005, along with penalty and interest. Taxpayer protests a portion of these assessments and penalty. Further facts will be provided as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of sales and use tax for the years 2003, 2004, and 2005. The Department used the best information available to determine the amount of sales subject to sales tax, as provided by IC § 6-8.1-5-1(a). Taxpayer protests that the Department included sales which were not subject to sales tax in the amount used to calculate sales tax. Proposed assessments are presumed to be correct and the burden of proving them wrong rests with the taxpayer, as provided by IC § 6-8.1-5-1(c).

The Department determined the amount of sales subject to sales tax after reviewing the available records. Taxpayer was unable to provide records for several months in 2003, which lead the Department to determine that there were additional sales subject to sales tax, which in turn resulted in the largest portion of the proposed assessments for this tax period. While Taxpayer did provide a spreadsheet explaining what it believes are the correct numbers of sales subject to sales tax, Taxpayer did not provide documentation supporting the spreadsheet numbers.

As previously explained, the burden of proving a proposed assessment wrong rests with the taxpayer against whom the proposed assessment is made. While Taxpayer has explained what it believes are the correct numbers of sales subject to sales tax, it has not established that those numbers are more reliable than the Department's determination. Therefore, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). In the course of its protest, Taxpayer explained that a former employee had erred in their bookkeeping duties. Taxpayer has since replaced that employee and put in place a more reliable system. Taking this remedial action into account with the fact that the majority of the assessments at issue resulted from a few month's missing records, Taxpayer has affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is sustained.

WL/LS/DK December 3, 2007.